SUPREME COURT
OF THE
UNITED STATES.

October Term, 1936

No. 456.

Ray Ingels, as Director of the Motor Vehicle Department of the State of California; Howard E. Deems, as Registrar of the Motor Vehicle Department of the State of California; John C. Corbett, Fred E. Stewart, R. E. Collins, Ray Edgar and Ray L. Riley, as Members of the State Board of Equalization and Constituting Said Board in the State of California; and E. Seymour,

Appellants,

vs.

Howard Morf, Doing Business Under the Firm Name and Style of Pacific Wholesale Automobile Company; United States Fidelity and Guaranty Company, a Corporation; and Continental Casualty Company, a Corporation,

Appellees.

BRIEF AS AMICUS CURIAE SUPPORTING POSITION OF APPELLEES.

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Statement as to Amicus Curiae.

Asher and Ponder, a co-partnership, are engaged in the same business as, and are competitors of, Appellees in this action. They now have pending, in the District Court from which this appeal was taken, a similar action, brought on their own behalf against the same principal defendants, decision in which action has been stayed pending the determination of the present appeal. Their interests, therefore, are the same as those of Appellees.

Statement of Case.

The present cause is a suit to enjoin, as unconstitutional, the enforcement of the so-called "Caravan Act" of California (Cal. Stats. 1935, c. 402, p. 1435)—the alleged basis of unconstitutionality being that the Act:

(1) Is an unconstitutional discrimination against, and regulation of, interstate commerce by a State;

(2) Is a denial of the guaranteed Equal Protection of the Laws; and

(3) Is a denial of Due Process of Law.

Briefly stated, the principal provisions of the Act require the payment of a $15.00 fee, *for the benefit of the general fund of the State,* for all *inter*state (but not *intra*state) movement of automobiles travelling on their own wheels (whether under their own power or in tow), if said automobiles travel for the purpose of re-sale (but not if they travel for any other purpose).

Outline of Argument.

I. The Act unconstitutionally regulates, and discriminates against, interstate traffic because it imposes a charge upon interstate commerce without dealing in similar fashion with a similar intrastate commerce equally situated.

II. The Act denies equal protection of the laws because it discriminates:

A. Against interstate, and in favor of intrastate, movement of automobiles;

B. Against automobiles intended for resale and in favor of automobiles similarly driven for other purposes.

III. The Act denies due process of law, because

A. It imposes a regulation bearing no relation to the evils alleged to exist;

B. The evils alleged do not, in fact, exist.

ARGUMENT.

Introduction

The applicable authorities already have been cited to this Court in the Brief of Appellants or will be cited in the Brief of Appellees. Consequently, the *Amicus Curiae* does not intend to burden this Court with elaboration of legal principles not seriously in question.

We take the following to be well settled:

(1) That a state cannot constitutionally prohibit, or discriminate against, Interstate Commerce;

(2) That a lawful business cannot constitutionally be prohibited or harassed, except in the aid of, or alleviation of, an existing, real and significant public evil;

(3) That any regulation of Interstate Commerce, or of a lawful business, must be reasonable and adapted to the removal of the evils alleged to exist.

That the Act affects Interstate Commerce, and Interstate Commerce only, is apparent from its language, is found as a fact by the District Court, and is not questioned by Appellants. That Appellee's business is lawful is unquestioned; and that it will be destroyed by the Act is found by the District Court on evidence ample to support it. Appellants attempt to dispute this finding by the claim (Brief, pp. 8-9) that the fee could be passed on to Appellee's customers. It is apparent, however, that used automobiles, whether or not imported into California, compete not only with each other, but with new cars. It is common sense that a possible purchaser will not forego the pleasures of a shiny new automobile with the latest design and equipment except for a considerable saving in

price. The testimony of Appellee Morf supports the finding that the price of used cars could not be increased by the amount of this fee without driving customers away from the used car market.

With these facts before us, we turn to examine the nature of the Act and its legal effect.

I.

The Act Unconstitutionally Regulates, and Discriminates Against, Interstate Commerce, Because It Imposes a Charge on Such Commerce Not Imposed Upon Similar Intrastate Commerce.

The District Court found specifically that there existed "*considerable*" intrastate movement of automobiles for purposes of re-sale. This finding is supported, amply, by the testimony of Appellee. Against it, Appellants cite only the testimony of one Martland—an unofficial observer—which is summarized in the statement:

> "I don't say it [intrastate caravanning] doesn't exist, but I have never seen it." [R. 58.]

and Chief Cato's admission that there is

> "some caravanning of cars within the state from place to place, but it is small." [R. 54.]

We submit that this inconclusive "negative" testimony that two witnesses had never happened to observe intrastate caravanning affords no basis for disregarding a definite, formal finding by the District Court, based on "affirmative" evidence and the whole record and on that Court's observance of the witnesses, that such intrastate caravanning *did* exist; and that it existed in considerable amount—enough to be a factor in the problem.

This fact of intrastate carvanning itself, even if it stood alone, would be sufficient to distinguish the decision in *Morf v. Bingaman*, 298 U. S. 407, on which Appellants rely. The case cited concerned a statute directed at interstate and intrastate movements alike, and the District Court there had made no finding that intrastate movements did exist in serious number. On the finding made in the present case, the applicable rule is that laid down by this Court in

Guy v. Baltimore, 100 U. S. 434;

West v. Kansas National Gas Co., 221 U. S. 229,

namely: That a state cannot tax, regulate or prohibit Interstate Commerce unless (at the least) it imposes the same controls on Intrastate Commerce similarly situated.

II.

The Act Denies Equal Protection of the Laws Because It Discriminates:

A. Against Interstate, and in Favor of Intrastate, Movement of Automobiles.

This point involves the same facts, and the same legal doctrines, as those just discussed in Point I.

B. Against Automobiles Intended for Re-sale, and in Favor of Automobiles Similarly Driven for Other Purposes.

The Act itself shows that the determining factor is not the type of movement, but the purpose of transportation. Caravanning is defined to include the transportation only of

> "any motor vehicle . . . for the purpose of selling or offering the same for sale . . ." (Sec. 1.)

An owner of motor vehicles may bring them to the borders of California, drive them singly, in tow, or in any other fashion, to any point in the state, with the same conditions as to character of drivers, presence or absence of lights, swaying of cars in tow, observance or violation of local traffic laws, and be entirely free of any fee or attention under this Act, if only he desires those vehicles for some purpose other than re-sale.

The sole basis alleged by Appellants as a foundation for the Act is that carvanning creates traffic hazards. Why this hazard should result from the intention of the owner to sell his automobile, is no where explained!—nor can it be! If such traffic hazards are, in fact, created (as to which reference is made below), they are created by the *manner in which* the automobiles are driven, not by the *purpose for which* they are driven! The restriction of the class to those driven for a single purpose, plainly shows that the alleged basis is false in fact as well as in law.

This becomes even more plain when the situation of the single vehicle is considered. This situation is here presented to this Court for the first time, having expressly been left undecided in *Morf v. Bingaman*. Here the Bill alleged, defendants admitted, evidence showed, and the District Court found, that there was, in fact, single car movement.

Appellants, for obvious reasons, do not attempt to argue that *any* evil results from the interstate (or intrastate) transportation of a single vehicle for the purpose of re-sale that does not result, equally, from the transportation of any other single vehicle for any other purpose. They content themselves with saying (Brief, 49-60) that un-

offending vehicles may be included in order more easily to reach the offending.

This Court has, indeed, held that a small quantity of innocent business can be subjected to restraint where the larger quantity cannot otherwise efficiently be governed. But no such situation exists here:

(1) By Appellants own admission (Brief, p. 47), from 30% to 40% of the automobiles involved move as single units. Surely this is not the "reasonable margin" of which this Court spoke in *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388; but a definitely separate group, entitled to separate treatment.

(2) Nothing cited is adequate to show why single automobiles cannot effectively be distinguished. *All* the automobiles pass under the scrutiny of the border inspectors. Whether an automobile moves under its own power or in tow of another is a fact observable at a single cursory glance. This is not a case where difficult and expensive investigation would be required to segregate the innocent from the offending; it is not a case where difference of treatment would be difficult. Each car is separately licensed; each one, whether single or in tow, is separately treated on the records of Appellants. Why, then, cannot the single car effectively be given the freedom to which Appellants themselves seem to concede it is entitled?

When attention is directed, as it was by the District Court in its opinion, to the other legislation enacted by the California Legislature at the 1935 session, and particularly at the so-called "Ninety Day Law" (Cal. Vehicle Code, 146.5), held unconstitutional in *Asher and Ponder v. Ingels,* 13 Fed. Supp. 654, which attempted to prohibit

the licensing of any imported automobile for a fixed period of ninety days, the real purpose of the Legislature is made clear. The Legislature desired to suppress the business of importation of used automobiles from other States. To that end, it imposed the unreasonably large, discriminatory fee herein involved and then attempted to "quarantine" the vehicles, after arrival, for so long a period that the cost of keeping them would make profitable re-sale impossible. The two acts clearly show the purpose of the Legislature to have been simply the protection of the California automobile market against used cars imported from other States.

III.

The Act Denies Due Process of Law, Because:

A. It Imposes a Regulation Bearing No Relation to the Evils Alleged to Exist.

The evils alleged by Appellants may be summarized thusly:

(1) Poor drivers;

(2) Improper "spacing" of cars in travel;

(3) Improper methods of coupling cars; and

(4) Violation of local traffic laws—particularly *slow!* driving (Brief, p, 13, lines 11-13), and improper or insufficient lights.

Reference to the various California laws cited and reprinted by Appellants in the Appendix to their Brief, shows that adequate statutory regulation exists, entirely apart from the Caravan Act, to meet every one of these alleged evils. Under sections 250 to 252 of the Vehicle

Code (Brief, pp. 91-92), provision is made for the licensing and control of drivers; under sections 510 and 511 (Brief, pp. 93-95), provision is made as to rate of speed; under sections 525, 531, 582, 618, 621 and 679 (Brief, pp. 95-99), provision is made as to every other claimed evil. If the State of California does not deem these regulations strict enough, she is quite free to amplify them.

These sections constitute direct, equal, non-discriminatory regulations of the alleged evils. Under them, such evils may be eliminated. Under the Caravan Act, the importer pays $15.00 at the border, then is free to continue, at will, without further check. We fail to see how, or wherein, the payment of a fee of $15.00 at the border will serve to improve the quality of driving on the part of the payer's employees.

But, it is claimed, the $15.00 fee permits more adequate policing of the highways inside the State, and, therefore, more efficient enforcement of the sections of the Vehicle Code referred to above. To this there are two answers, each sufficient in and of itself.

(1) *The monies received from this fee are* NOT *used for this purpose.*

While the Act recites (Sec. 6) that the fee is to reimburse the State for the added expense of enforcement, the same section expressly negatives this purpose by placing the monies collected in the *general fund* of the State. Under the Vehicle Code, salaries and expenses of high-

way patrolmen are paid, not from this fund, but from the special *highway* fund. Appellants themselves admit (Brief, pp. 66-70), that there is *no* appropriation of this money to *any* highway purpose, unless the Legislature, in the future, may, perchance, make such an appropriation. It would seem to follow that the fee collected has no relation to the prevention of traffic hazards.

But such prevention is the only possible basis for the validity of the Act. Appellants, at this point in their argument, suddenly abandon the claim that the Act exists to assist in policing the highways, and attempt to support it as a fee for the general privilege of using the highways. But *that* privilege is extended for an annual period, to automobiles not imported in interstate commerce, by the payment of the fee prescribed in the Vehicle License Fee Act (Cal. Stats. 1935, c. 362) (see Brief, pp. 99-100). (Construed as a privilege tax in *Ingels v. Riley,* 5 Cal. (2d) 154, 53 Pac. (2d) 939); and this same Vehicle License fee must be paid by the imported vehicle as soon as it comes to rest in California, since the caravan license

> ". . . shall be valid only for the trip or trips to be specified in said permit, and in no event shall such permit be valid for a period of more than ninety days . . ." (Caravan Act, §4)

the car then being subjected to the other license laws of the State. (Caravan Act, §5.) In other words, the Caravan Act imposes on interstate cars, an *additional* fee, not imposed on intrastate cars equally held for re-sale.

(2) *Finally, the fee charged, even if it were allocated in its entirety to alleviation of the alleged evils, is unreasonable.*

The District Court has found squarely on this point. Under evidence, not contradicted, that Court found that the fee would permit a special officer to accompany *each car* during its entire trip in California, with a profit besides. No one even suggests that such special attention will be given; the head of the Department himself testified that only six men had been added because of caravanning [R. 53.]

It is apparent that the District Court could have made no other finding than that the fee was not intended to be used for, nor was it used for, alleviation of the evils alleged to result from interstate importation of used automobiles.

B. The Claimed Evils Do Not, in Fact, Exist.

On this point, there is a square conflict in the evidence —that for Appellants being that they did, that for Appellees that they did not, exist. Appellee testifies not only that they did not exist as to him, but that other importers were, to his knowledge, equally free of guilt. [R. 60-63.] On this conflicting evidence, the District Court found, *as a fact,* that no serious traffic hazards were created by caravanning, as defined in the Act, that are not equally created by any automobile traffic, and that such hazards as are created by any traffic are not serious. This finding is binding on this Court. It, again, serves to distinguish

Morf. v. Bingaman, where the District Court made an opposite finding. It must be noted that the District Court here did not merely disagree with the supporters of the Caravan Act; that Court found that the supposed evils were fanciful and without significance.

Conclusion.

All of the above propositions—the lack of any real difference between the interstate traffic and the considerable intrastate traffic, the lack of any real difference between traffic for re-sale and that for other purposes, and the lack of connection between the alleged (but non-existent) evils and the remedy set up by the Statute—show, we submit, that the Act is merely an unconstitutional attempt by the State of California to prohibit the lawful interstate business of importing automobiles for re-sale in that State. The District Court so found. We believe this Court should sustain that finding.

Respectfully submitted,

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